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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 141

RED BALL MOTOR FREIGHT, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

Petitioner replies to the brief of respondent in opposition to the Petition for Writ of Certiorari as follows:

I. The Brief of the Board Fails to Show That the District of Columbia Circuit Applied the Substantial Evidence Test of the First and Fifth Circuits.

The Brief in Opposition to the Petition for a Writ of Certiorari points up clearly the unfair and intolerable position to which Petitioner has been relegated in this proceeding from its very inception. The Brief of the National Labor Relations Board does nothing more than

recite that seven employees were engaged in an effort to organize Petitioner on behalf of the Teamsters' Union and that these seven (among the many other employees who likewise sponsored and adhered to the Teamsters' Union) were discharged. It brushes aside the facts showing infractions of safety and other rules by the discharged employees in order to arrive at the conclusion that the discharges were based upon union activity. The Brief of the Board is wholly devoid of any citation to any substantial evidence which will sustain this conclusion. It has nothing to say of any effort by Petitioner to threaten or coerce its employees or of any unlawful activities engaged in by Petitioner during the election. A few references are made to statements made by officers of Petitioner but these fall short of sustaining the ultimate finding made by the Board regarding the discharges.

The evidence upon which the Board relies to show that the discharges in this case were for reasons other than just cause pales into insignificance when compared to the statements and activities of the employers in the cases cited in Petitioner's brief, which statements and actions were held by the First and Fifth Circuits not to constitute sufficient evidence to hold the company liable for the discharges it made. (See *N.L.R.B.* v. *Whitelight Products Division*, 298 F. 2d 12 (1 Cir., 1962), *cert. denied* 369 U.S. 887; *N.L.R.B.* v. *Whitin Machine Works*, 204 F. 2d 883 (1 Cir., 1953); *N.L.R.B.* v. *Atlanta Coca-Cola Bottling Co.*, 296 F. 2d 896 (5 Cir., 1961), and other cases cited in Petitioner's brief to this Court.)

II. The Facts in the Record Clearly Show, Under Principles Applied in Other Circuits, That All the Discharges Were Made With Sufficient and Just Cause.

The Board's Brief attempts to paint a picture of minor infractions committed by the seven employees which were seized upon by the Petitioner in order to carry out some unproved plan or concerted effort of discharging these particular seven men. However, a look at the facts show that there is no proof whatever that such was the case.

1. *Horace Limbaugh*

The Board's brief fails to state that prior to the backing accident for which he was discharged Horace Limbaugh was involved in five backing accidents between 1958 and March of 1962. Likewise, the acceptance by the Examiner of Limbaugh's suppositions regarding his discharge is clearly against all logic. Limbaugh, so he stated, felt that he was being discriminated against because Charles Fisk, a company Vice President, was after him and because he was not told how long he would be suspended pending a decision on the charge made against him. This was pure conjecture on Limbaugh's part and in no way proves that he was fired for Teamster activity. Also, Terminal Manager Lane advised him that he could check at the general offices to determine how long he would be suspended pending the investigation (J.A. 42-43) and he further asked him to report to him the next morning (J.A. 194, 661). Limbaugh did neither.

2. *Henry Lewis*

Henry Lewis was obtaining signatures from employees to support the Teamsters' Union. There is no evidence whatever in the record to show that the company was

aware of this activity. There *is* evidence, however, that he dropped tractor trailers on December 3, 1960, in Greenville, Texas; six days later in Tyler, Texas; and on February 6, 1961, in Clarksville, Texas. On February 11, 1961, he was told to improve his work. However, on April 26, 1961, he again did the same thing and was placed on probation for one year. While on this probation he committed the offense for which he was finally discharged.

3. *Elton Cathey*

To sustain a finding of unlawful discharge with respect to Cathey, the Examiner and the Board relied on the erroneous factual assumption that Cathey had acted as an observer for the Teamsters. The fact is that Cathey was not an observer, and the stipulation at J.A. 5-6 so shows. Aside from this gross error, which should vitiate any further findings made regarding Cathey's discharge, there is no mention in the Board's brief that Cathey told one Rex M. Murphy, a Red Ball mechanic, at the scene of the accident for which he was discharged that he expected he would be fired for not checking his equipment (J.A. 213). Nor is there any discussion concerning the great amount of evidence presented by the company as to the knowledge that Cathey should have had regarding the condition of the wheel which ultimately was thrown from his truck.

4. *William Clem*

William Clem was laid off in April, 1962, as were several others in the trailer shop for economic reasons (J.A. 415). However, Clem was offered a job by Harold Odum, Red Ball's maintenance supervisor, in the Denver terminal at higher pay, which he declined to take. Clem was also advised by Odum, as a member of a group, that any of the employees were at liberty to exercise their seniority to

bump and obtain a job which they had the seniority to obtain and the qualifications to hold. (J.A. 308). Clem was discharged for valid economic reasons and could have obtained a position with Red Ball in Denver had he so desired.

5. *Joe Shamblin*

Joe Shamblin was discharged for negligence in his job. There was much testimony regarding Shamblin's attitude toward the company and errors made by him, but the most important ones, which were not explained in the Board's brief, were that Shamblin made disparaging remarks about the company and its policies, that he was involved in an accident on April 6, 1962, and warned about both it and his attitude toward the company, and that on April 25, 1962, he signed for freight when he knew he had not picked it up. (J.A. 134, 135). On May 1, 1962, he failed to pick up six tires and a sign, but signed that he *had* received them. Also Shamblin had been warned three times in 1958 about failing to check freight and was given a letter of warning by the company on April 8, 1958.

Further, the record does not support the statement in the Board's brief that 40 to 50 reports daily were made concerning shipment shortages. These 40 to 50 reports would include shortages delivered to consignees, which would also include shortages properly noted and properly handled with no employee negligence (J.A. 198).

6. *Gordon Hodgkins and W. T. Willingham*

Gordon Hodgkins had been warned about speeding on July 17, 1961, by Safety Director Barr. On April 24 or 25, 1962, a safety meeting was held in Dallas by Barr at which safety was stressed because of an increase in accidents in March of 1962. (J.A. 127). On May 3, 1962, at night, Barr set up a radar in Corsicana, Texas, to check

Red Ball equipment operating between Houston and Dallas. Hodgkins was observed exceeding the speed limit by five miles per hour and was discharged. From these facts the Board found that there was discrimination against him.

W. T. Willingham was given a written warning in March of 1962 for exceeding the 10 miles per hour speed limit on Red Ball's property. Two other men also received such notices. On May 9, 1962, Barr observed Willingham's truck at City Dock No. 18 and followed it, observing it exceed the speed limit by five miles per hour and go through a red light. He was discharged. The Board's brief also fails to mention that during the hearing, Willingham denied having received any violation notices (when he had) and also denied being the same W. T. Willingham who was convicted of a felony. (The Board never brought forth any evidence that Willingham was not the same man who was convicted of a felony although counsel for the General Counsel was granted time within which to do so.)

The foregoing facts, under the cases as decided in the other Courts of Appeals, clearly preclude and render erroneous the findings made by the Board in this proceeding. Surely Petitioner was not obliged to show that these employees were *not* active in the union. All that it was required to do was to show that they *were* guilty of violating the company's rules and that the discharges were based upon these violations (or upon economic necessity). To fault the company for having discharged these men and to make it prove that it did not discharge them other than for cause places an insuperable obstacle in Petitioner's path and violates due process. The facts show what transpired. By conjecture and illogical reasoning based upon no substantial evidence in the record as a whole the

Board found the discharges were illegal. Such a finding should be reversed in keeping with the practice of the other Courts of Appeals.

Conclusion

All the foregoing shows clearly that, under the principles applied in other circuits, there was no substantial evidence on the whole record to sustain the findings made by the Examiner and the Board. Decisions under the National Labor Relations Act should not depend upon who wins the race to the courthouse.

It is respectfully submitted that this Court should grant the Petition for Certiorari to rectify the errors made below and to insure fair and uniform enforcement of the National Labor Relations Act.

Respectfully submitted,

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